

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE KOPEXA REALTY VENTURE
CO., a Kansas General Partnership,

Debtor.

BAP No. KS-96-45

EARL E. KOPP and CAROLYN
KOPP,

Appellants,

Bankr. No. 95-21261

Chapter 11

v.

ALL AMERICAN LIFE INSURANCE
COMPANY; THE UNITED STATES
LIFE INSURANCE COMPANY IN
THE CITY OF NEW YORK; CARL
R. CLARK, Chapter 11 Trustee for
Kopexa Realty Venture Co.; and
DARCY WILLIAMSON, Trustee for
C.K. Williams, Inc.,

Appellees.

ORDER GRANTING JOINT
MOTION TO DISMISS APPEAL
AS MOOT
February 28, 1997

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, and BOHANON and BOULDEN, Bankruptcy
Judges.

BOULDEN, Bankruptcy Judge.

Pending before this Motions Panel is a Joint Motion to Dismiss
Appeal as Moot ("Motion") filed by All American Life Insurance Company, The
United States Life Insurance Company in the City of New York, and Carl R.
Clark, Chapter 11 Trustee for Kopexa Realty Venture Company ("Appellees").
Earl E. Kopp and Carolyn Kopp ("Appellants") have responded to the Motion by

requesting that the Motion be denied. We grant Appellees' Motion and dismiss this appeal as moot.

I. Background

Kopexa Realty Venture Co. ("Debtor") filed a petition in the United States Bankruptcy Court for the District of Kansas seeking relief under chapter 11 of Title 11. Carl R. Clark was subsequently appointed as chapter 11 trustee ("Trustee").

Slightly more than three months after his appointment, the Trustee filed an Application for Approval of Sale of Substantially All Debtor's Assets Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 and for Authority to Assume and Assign Leases Pursuant to 11 U.S.C. § 365 ("Application"). The Application sought Bankruptcy Court approval to sell the Debtor's real property to The United States Life Insurance Company in the City of New York ("USLIFE"), a perfected secured creditor, under 11 U.S.C. § 363(b). The Application was based on terms set forth in a letter offer to purchase that was attached to the Application. The letter offer was expressly conditioned upon a finding by the Bankruptcy Court that USLIFE was a good faith purchaser for value, and upon the estate passing title "free and clear of all interests allegedly claimed by any other parties, including but not limited to the [Appellants], their children, or any entities owned or controlled by the [Appellants] or their children." (Application, Ex. "A," at 2 ¶¶ 5-6.) The Application also sought Bankruptcy Court approval for the Trustee to assume and assign five unexpired leases to USLIFE under 11 U.S.C. § 365.

The Appellants filed an objection to the Application.¹ A two day contested hearing was initiated on August 1, 1996 and concluded on August 9, 1996. At the conclusion of the contested hearing, the Bankruptcy Court

¹ Appellants are general partners and insiders of the Debtor. Appellant Carolyn Kopp is also an insider of one of the Debtor's lessees.

announced that it would grant the Application.²

An Order Approving Chapter 11 Trustee Carl R. Clark's Application for Approval of Sale of Substantially all Debtor's Assets Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 and for Authority to Assume and Assign Leases Pursuant to 11 U.S.C. § 365 ("Order"), was entered on August 29, 1996. The Court entered the Order despite the Appellants' assertion that on August 27, 1996, they "advised the Court that the proposed [Order] contained inaccurate statements." (Appellants' Suggestions in Opposition of Joint Motion to Dismiss Appeal as Moot, at 3.) The Order adjudged USLIFE "a good-faith purchaser, as that term is used in § 363(m) of the Bankruptcy Code" and "a good-faith assignee" of the five unexpired leases. The Order decreed that "the sale be and hereby is entitled to the protection afforded under § 363(m)." (Order, at 6-7.)

On September 3, 1996, five days after entry of the Order and nearly a month after the Bankruptcy Court announced it would grant the Application, the Trustee conveyed the real property that was the subject of the Application to USLIFE by trustee's deed. On the same day, the Trustee executed and delivered to USLIFE a bill of sale for the personalty associated with the real property and delivered an assignment of leases assigning the leasehold interests that were also the subject of the Application.

The Appellants timely filed a Motion for Reconsideration of the Order Approving Chapter 11 Trustee Carl R. Clark's Application for Approval of Sale of Substantially all Debtor's Assets Free and Clear of Liens and Encumbrances Pursuant to 11 U.S.C. § 363 and for Authority to Assume and Assign Leases Pursuant to 11 U.S.C. § 365 ("Motion for Reconsideration")³ on

² The docket entry for August 9, 1996 states: "Court will approve sale."

³ The Court will interpret the Motion to Reconsider as a Motion to Alter or
(continued...)

September 9, 1996. The Motion for Reconsideration came on for hearing before the Bankruptcy Court on November 8, 1996. At the hearing and by journal entry executed November 8, 1996, the Bankruptcy Court denied the Motion for Reconsideration.

On November 15, 1996, the Appellants timely appealed the Order and filed in the Bankruptcy Court, for the first time, a Motion to Stay the Order pending appeal. The Bankruptcy Court has not ruled on the Appellants' Motion to Stay the Order pending appeal, and the Appellants have not filed a Motion for Stay Pending Appeal under Fed. R. Bankr. P. 8005 with the Bankruptcy Appellate Panel.

II. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within the Tenth Circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). The Order granting the Application is a final order. Neither party to this appeal opted to have the appeal heard by the United States District Court for the District of Kansas. Jurisdiction is therefore present. 10th Cir. BAP L.R. 8001-1(e).

III. Standard of Review

This issue is whether this appeal of the Order granting the Application is moot under 11 U.S.C. § 363(m). We consider questions of mootness using a plenary standard of review. Mohawk Rubber Co. v. Otasco, Inc., No. 89-5112, 1991 WL 90840, at *2 (10th Cir. May 31, 1991).

IV. Discussion

If the order authorizing the sale is not stayed,⁴ a sale under 11

³ (...continued)
Amend Judgment under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e).

⁴ Fed. R. Bankr. P. 8005 sets forth the procedure for filing a motion for a stay pending appeal. Fed. R. Bankr. P. 8005 provides in relevant part:

(continued...)

U.S.C. § 363(b) to a good faith purchaser is insulated from the potential consequences of an appeal. 11 U.S.C. § 363(m);⁵ Osborn v. Durant Bank & Trust Co. (In re Osborn), 24 F.3d 1199, 1203 (10th Cir. 1994). Unless a remedy that would not affect the validity of a sale is sought, such a sale is not subject to appellate review. Id. at 1203-04 ("By removing those remedies that would affect the validity of a sale to a good faith purchaser, § 363(m) moots some appeals, namely those in cases where the only remedies available are those that affect the validity of the sale." (footnote omitted)). *See also* Kuntz v. Cray Computer Corp. (In re Cray Computer Corp.), No. 96-1125, 1996 WL 547320, at *1 (10th Cir. Sept. 26, 1996) ("Therefore, a finding of good faith under § 363(m) moots appeals in cases 'where the only remedies available are those that affect the validity of the sale.'" (citations omitted)).

The Order has not been stayed. Appellants did not file a motion to stay the Order pending appeal until over three months after the Bankruptcy Court announced it would grant the Application, and until over two and one-half

⁴ (...continued)

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge.

⁵ 11 U.S.C. § 363(m) states:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

months after Appellants advised the Bankruptcy Court that a proposed order granting the Application contained inaccuracies. Appellants' argument that they should not be penalized for not obtaining a stay before the sale was consummated on September 3, 1996, because they did not learn the Order had been *signed* until September 6, 1996, is not well taken. The Appellants do not assert that they were prevented from filing a motion under Fed. R. Bankr. P. 8005 prior to September 3, 1996. The result is simply that no stay exists.

Appellants' argument that this appeal is not moot because USLIFE is not a good faith purchaser also lacks merit. The Appellants' assert that USLIFE is not a *bona fide* purchaser because it had full knowledge of leases controlled by the Appellants, and because USLIFE credit bid as part of the consideration under the letter offer, rather than elect to file a motion for relief from the automatic stay. These assertions are inapplicable to the determination of good faith and the Appellants, by these arguments, attempt to graft a standard into 11 U.S.C. § 363(m) that simply does not exist. Credit bidding rather than lifting the automatic stay and the lack of *bona fide* purchaser status are not elements considered in a determination of good faith purchaser status under controlling case law. Under 11 U.S.C. § 363(m), a good faith purchaser is "one who buys in 'good faith' and for 'value.'" Tompkins v. Frey (In re Bel Air Assocs., Ltd.), 706 F.2d 301, 305 (10th Cir. 1983) (footnotes omitted) (construing language similar to 11 U.S.C. § 363(m) found in Fed. R. Bankr. P. 805, the precursor to current Fed. R. Bankr. P. 8005). To destroy USLIFE's good faith purchaser status, Appellants must show "'fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.'" Id. at 305 n.11 (citations omitted). Assuming Appellants' assertions regarding USLIFE's knowledge of the leases under the Appellants' control and USLIFE's credit bid are true, such conduct does not defeat USLIFE's good faith purchaser status. The Appellants have not alleged conduct on USLIFE's part that would

constitute fraud, collusion, or an attempt to take grossly unfair advantage of other bidders. Neither have they challenged that USLIFE purchased the Debtor's assets for value. Appellants' challenges to USLIFE's good faith purchaser status fail.

Appellants have failed to request a remedy that would not affect the validity of the sale. They seek modification of the Order to make it subject to, rather than free and clear of, the leases controlled by the Appellants. USLIFE's offer, as set forth in the Application, was contingent upon obtaining good faith purchaser status and upon the estate passing title free and clear of all interests claimed or controlled by the Appellants. Invalidating either of these contingencies is directly contrary to USLIFE's offer to purchase and would invalidate the sale.⁶

V. Conclusion

The real property that is the subject of this dispute was sold to a good faith purchaser pursuant to a lawful order of the Bankruptcy Court that was not stayed or modified. The remedy sought by Appellants would affect the validity of that sale. The real property has been removed from our jurisdiction, thereby rendering this appeal moot. It is

HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The appeal is DISMISSED as moot.

A certified copy of this Order, sent to the Bankruptcy Court, shall stand as and for the mandate of the Court.

⁶ Appellants' attempt to interpret 11 U.S.C. § 363(m) to say that the Court may materially modify the Order without affecting the validity of the sale is disingenuous for the same reasons. Modifying the Order to make the sale subject to leasehold interests would affect the validity of the sale and thus violate 11 U.S.C. § 363(m).